debts, and, if he becomes bankrupt, they pass to his trustee. . . ."

Pollock & Mulla (4th Edition) says the same thing at page 35.

"An agreement to sell, which is also called an executory contract of sale, is a contract simply, and creates only a *jus in personam;* the property in the goods which form the subject-matter of the contract remains in the seller, so that they may be taken in execution for his debts, and belong on his bankruptcy to his trustee in bankruptcy ..."

The claimant's claim had to be and was held to have failed.

Claim failed.

Solicitors : *Gurdial Singh & Co.; Nik Hussain, Ibrahim & Abdullah.*

SUN SOON HENG COACH WORKS SDN. BHD. v. NIMA TRAVEL SDN. BHD.

[O.C.J. (Shankar J.) June 12, 1985]

[Johore Bahru – Civil Suit No. 619 of 1984]

Contract – Contract for repair of bus – Delivery taken of repaired bus – Full payment not made – No complaint about defective repair at the time of delivery and considerable time thereafter – Plea of defective work on demand of full repairing charges – Plea untenable.

Evidence – Relevancy of proposals and statements in course of negotiation – Evidence Act, 1950 s. 23.

Company Law – Winding up petition by creditor on ground of inability to pay – Disputed debt – No order for Winding up – Companies Act, 1965, s. 218;

The defendants were the owners of a bus. The bus met with an accident and was extensively damaged. The plaintiff agreed to repair it for $69,180. The defendant took delivery of the repaired bus on September 23, 1983. The defendants paid $20,000 in November, 1983. Two cheques for $49,180 were given in January, 1984. Both the cheques were dishonoured. Thereafter defendants paid $5,000 in cash. On February 18, 1984, the plaintiffs' solicitors issued a statutory notice under section 218 of the Companies Act to pay the balance of $44,180 or face winding up proceedings. The defendants then for the first time wrote to the plaintiffs that the coach repaired was not in accordance to specifications and of good merchantable quality. Meanwhile defendants offered to pay the amount by instalments provided an adjustment of $1878 was made in the repair bill.

The plaintiff did not accept the proposal. Meanwhile defendants paid in cash $8000. The application for winding up came before the judge. As the debt was disputed the judge refused to make winding up order. On October 9, 1984, the plaintiffs filed a writ and on December 11 filed an application for summary judgment. The Senior Assistant Registrar gave defendants leave to defend. The judge allowed an appeal by plaintiffs against that order. The defendants counterclaimed for $33,000 as damages for breach of contract, interest and costs.

Held: (1) defendants took delivery of the bus, operated it for quite some time and never took the plea that the bus had not been repaired as per specifications;

(2) there was no failure of consideration;

(3) defendants' conduct in obstructing the plaintiff's claim amounted to an abuse of the process of the court;

(4) there was no material basis for defendant's counterclaim.

Cases referred to:

(1) *Tomlin* v. *Standard Telephones & Cables Ltd.* [1969] 3 All E.R. 201.

(2) *Sunshine Securities Pte. Ltd.* v. *Official Receiver & Liquidator of Mosbert Acceptance Ltd.* [1978] 1 M.L.J. 57.

(3) *Malayan Banking Bhd.* v. *Foo See Moi* [1981] 2 M.L.J. 17.

CIVIL SUIT.

Ong Ban Chai for the appellants/plaintiffs.
Song Teik Kim for the respondents/defendants.

Cur. Adv. Vult.

Shankar J. : On May 13, 1985, I allowed an appeal by the plaintiffs against the decision of the Senior Assistant Registrar giving the defendants leave to defend on an application for Summary Judgment. As the defendants have applied for leave to appeal against my decision to the Supreme Court, the reasons for my judgment now follow.

The defendants were at all material times and still are the owners of Bus No. WAD 4274. This bus met with an accident prior to March 21, 1983. A photograph has been produced to me to show the condition in which the bus was after the accident. It was extensively damaged. The price agreed for the repairs was $69,180. The defendants say that they then left the bus with the plaintiffs together with the drawing which contained the specifications that the repair works were required to conform to. By September 23, 1983 the plaintiffs completed the works at their premises in Johore Bahru. Mr. Su Ah Kau, a director of the defendants, came down to Johore Bahru to take

delivery. He was accompanied by the defendants' driver Encik Bakar.

The plaintiffs issued an invoice against the defendants for the agreed price of $69,180. But the defendants did not make any immediate payment. Mr. Su spent some time in the plaintiffs' premises in discussions with Mr. Phang Sun Wah, a director of the plaintiffs after which Encik Bakar drove the bus back to Kuala Lumpur. About November 1983, the defendants paid $20,000 to the plaintiffs. In December, 1983 the defendants gave the plaintiffs two cheques one dated January 3, 1984 for $10,000 and another dated January 7, 1984 for $39,180. It is to be noted that the sums for which these cheques were made out together with the $20,000 paid earlier amounts to $69,180 which was the price agreed between the parties. But both the cheques bounced when presented for payment in January 1984. Shortly thereafter the defendants paid the plaintiffs $5,000 in cash leaving a balance due of $44,180.

On February 18, 1984, the plaintiffs' solicitors issued a statutory notice pursuant to section 218 of the Companies Act 1965 requiring the defendants to pay this sum within 21 days or face winding up proceedings. In response, the plaintiffs solicitors received a cryptic letter from the defendants' solicitors dated February 28, 1984 in which the defendants denied the debt and stated that,

"... the coach repaired was not in accordance to specifications and in good merchantable quality."

This is the first time that any allegation in writing was made by the defendants to this effect but no particulars whatsoever were given in the letter as to how the repairs were not in accordance to specification. The same day the defendants' solicitors wrote a "without prejudice" letter in which they stated that they were prepared to settle the debt in four monthly instalments provided a deduction was made in the balance price for $1,878. This proposal was not accepted by the plaintiffs.

Thereafter on April 11, 1984, the defendants made a further cash payment of $4,000 together with a cheque dated April 24, 1984 for $6,000. But this cheque was dishonoured upon presentation. The plaintiffs had by this time presented a winding up petition No. 8 of 1984 in this High Court and on April 23, 1984 the defendants through their solicitors wrote another "without prejudice" letter. In this it was proposed that provided that the plaintiffs postponed their application for the winding up of the company by six months from May 1, 1984 the defendants would settle by paying $10,000 immediately and the balance in monthly instalments of $5,000 until the full debt was repaid. This proposal was not accepted by the plaintiffs. They carried on with their winding up proceedings. On June 11, 1984 the plaintiffs received a further $4,000 reducing the balance to $36,180.

The application for the winding up was heard on September 22, 1984 and I delivered judgment in this Court on October 2, 1984 refusing the plaintiffs' application for a winding up order. That judgment speaks for itself. I directed that since the defendants were disputing the plaintiffs' claim the matter would be more appropriately resolved in a civil action so that the debt due from the defendants to the plaintiffs could firstly be properly established. Thereafter on October 9, 1984 the plaintiffs filed this writ. The defendants entered appearance. Then on December 11, 1984 the plaintiffs filed an application for Summary Judgment. But the Registry only endorsed their Summons on January 22, 1985 and were able to give them a date only on March 30, 1985.

On February 5, 1985 notwithstanding the pendency of the application for Summary Judgment the defendants filed a Statement of Defence. In this pleading, the defendants averred that they had countermanded the cheques which they had given to the plaintiffs because there was a total failure of consideration in that the bus had not been repaired to specifications. They further pleaded that if found liable they would seek to set off "for so much as is sufficient to extinguish their liability to the plaintiffs". Paragraph 12 of the Defence goes on to read that the defendants repeat 3 – 7 of the Defence (which is a bare section that there was a total failure of consideration because the coach was not repaired to specifications) and the pleading concludes with a prayer that the defendants' counterclaim for a sum of $33,000/- damage for breach of contract, interests and costs.

The defendants did not file their affidavit in reply showing cause why they should be given leave to defend until March 25, 1985. On March 30, 1985, the Senior Assistant Registrar heard arguments and gave leave to the defendants to defend and the plaintiffs appealed.

I now deal with the respective contentions of the parties.

Plaintiffs' case is that the work on the bus was done substantially in accordance with the defendants' requirements and that the defendants accepted the bus without complaint when they took delivery on September 23, 1983. Thereafter payment came from the defendants in drips and drops and they were forced to resort to legal proceedings to recover their moneys. They emphasised that it was only on February 28, 1984, for the first time, that the defendants made any suggestion that the repairs were not in accordance with the agreed requirements. But this contention the plaintiffs were not prepared to countenance since the defendants had already had the use of the bus for some 17 months. In the argument before me, Mr. Ong Ban Chai suggested that there were grounds to show that the defendants had in fact been operating the bus after taking delivery.

For the defendants, submissions were made which were at variance with the defence and the affidavit filed. The claim by the defendants' director in his affidavit is that although he came all the way from Kuala Lumpur to Johore Bahru with Encik Bakar to take delivery of the bus, he did not care to inspect the bus to see if the repairs were properly carried out. He claims that he spent all his time discussing matters with the plaintiffs' director on progressive payments and that it was only after they got back to Kuala Lumpur that it was noticed that the bus had not been repaired in accordance with the defendants' requirements.

At this point I would emphasize that neither in the defence nor in the affidavit showing cause has the defendants particularised in what respect the bus was not to specifications. Yet in his submissions, Mr. Song Teik Kim listed some 10 items of default which he submitted were so serious that if the bus were seen by the Road Transport Department a prohibitory order would inevitably have issued precluding the defendants from using the bus on the road.

In the same submission it was conceded for the defendants that the bus had been taxed and insured by the defendants for 1984 and it was suggested that the defendants had been using the bus illegally. This is the basis of the defendants' contention that there had been a total failure of consideration. From any point of view, this is a novel submission and I am compelled to reject it both on the facts and on the law. Had the alleged non-compliance of the plaintiffs been as serious as suggested by the defendants, I hold that it was the bounden duty of the defendants not to have driven the bus back from Johore Bahru to Kuala Lumpur, let alone operate it for a year thereafter.

I find Mr. Su's contention that he did not inspect the bus when taking delivery quite incredulous. But what followed after he got to Kuala Lumpur makes matters even more curious.

By December 1983 as I have already pointed out, the payments made by cash and cheques totalled the entire cost. This fact simply cannot be reconciled with the defendants' claim that after they got back to Kuala Lumpur they had come to some agreement with the plaintiffs that the latter would rebuild the bus to specifications and that they countermanded payments of the cheques given in December for the full balance of the purchase price only after the plaintiffs had failed to carry out their promise to put matters right.

In this context, it is not irrelevant to point out that from September 23, 1983, when the defendants took delivery, at no time was the bus brought back to the plaintiffs' premises for any further work to be carried out. This omission together with the failure of the defendants to make any protest until they were served with the notice of winding up proceedings sinks the defendants' case on the facts.

As far as the law is concerned, the claim that there had been a total failure of consideration cannot in the circumstances hold any water. The fact that the defendants operated the vehicle without being prosecuted is evidence to show that it was fit for the purpose for which it was intended and in any case the conduct of the defendants is such that they cannot be allowed to approbate the transaction and reprobate it when they are called upon to pay what is due from them.

As to the alleged illegality, there is not a shred of evidence to support it in the defendants' director's affidavit. There is not even an allegation to this effect in the Statement of Defence. To mount such a submission in argument is therefore impermissible. It is also presumptuous. It is no part of counsel's duty to speculate on what the Registrar and Inspector of Motor Vehicles might have done if the vehicle was sent to him. Ifs and buts are not the substance of which counsel's submission should be made.

Without relying upon any other material before me, I had no hesitation in giving judgment for the plaintiffs in this case for the balance due together

with interest from the date on which they filed their writ.

I now need to consider another aspect of this case.

It is the defendants' contention that after they took delivery they made part payments to the plaintiffs on a "without prejudice" basis and that therefore the plaintiffs were not entitled to rely upon the payments made as evidence in support of their claim in this case. They further contend that the cheques they gave the plaintiffs were also on a "without prejudice" basis and that as they countermanded these cheques because the plaintiffs did not carry out the repairs, these cheques were also privileged from disclosure. In support of this contention, the defendants annexed to their director's affidavit showing cause the two "without prejudice" letters dated February 28, 1984 and April 23, 1984.

But it is not the plaintiffs' solicitors who disclosed any "without prejudice" letters in support of their case in this suit. The defendants' solicitors have chosen to put them in evidence and this, of course, they are entitled to do. I am unable to see however how the letters help the defendants' case. The first letter dated February 28, 1984 was a response to plaintiffs' notice threatening winding-up proceedings which they made on February 18, 1984. There is nothing in the letter to suggest a total failure of consideration. On the contrary, the defendants were prepared to settle the full sum due less $1,878. In the second letter also there is nothing to suggest a total failure of consideration and the proposal is to pay substantially the full balance due in instalments. Neither letter has word about any set off or counterclaim for repair charges in the magnitude now claimed in the defence in the sum of $33,000.

In short these letters only go to prove well beyond the balance of probabilities that the defendants' conduct in obstructing the plaintiffs' claim for judgment amounts to an abuse of the process of this Court.

I was also unable to understand defence counsel's submission that the plaintiffs were not entitled to rely on the payments made by the defendants and the cheques given to them because these payments were made "without prejudice". Reference was made to section 23 of the Evidence Act. *Tomlin* v. *Standard Telephones and Cables Ltd.*[1] *Sunshine Securities Pte. Ltd.* v. *Official Receiver & Liquidator of Mosbert Acceptance Ltd.*[2] and *Malayan Banking Bhd.* v. *Foo See Mo.*[3]

It seems to me that one requires to distinguish here between proposals and statements made by parties in the course of negotiations with the intention of bringing about a settlement, which would of course be inadmissible, and actions taken by the parties after the conclusion of an agreement in which case not only would evidence of those negotiations become admissible but also the acts done in pursuance of them.

Implied in the defence submission is the contention that there was a concluded agreement between them and the plaintiffs, that the latter would at their own expense rectify the bus to conform to the defendants' precise specifications. Such payments as they made were, they say, without prejudice to this right, and the cheques were countermanded because the agreement was breached. In the result the letters and payments became admissible evidence upon which the Court had to determine whether in fact there was a concluded agreement as alleged.

But far from establishing any such agreement, the material proves beyond a peradventure that there was no valid defence to the plaintiffs' claim.

One last point which requires disposal is the fate of the claim made in the Statement of Defence for $33,000. To describe it as a counterclaim, in the circumstances of this case, is a travesty of the rules of pleading. At best it was a defence by way of a set off in reduction of the plaintiffs' claim, which the defendants appear to be suggesting that they are entitled to make if they were found liable. The material before me however does not provide any credible basis for this alleged set-off and it must fail.

My judgment against the defendants will therefore stand.

Order accordingly.

Solicitors : *Ong Ban Chai & Co.; Lim Cheng Poh & Lim.*